IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-415

FRANCIS A. RONDEAU, *Petitioner*

v.

MOSINEE PAPER CORPORATION, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF

MAURICE J. MCSWEENEY
DAVID E. BECKWITH
LYMAN A. PRECOURT
RICHARD H. PORTER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400
Attorneys for Petitioner

INDEX

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I. NEW MATERIAL

Petitioner respectfully calls the attention of the Court to *Scott v. Multi-Amp Corp.*, CCH Fed. Sec. Law Rep. ¶94,988 (D.N.J. 1974). The case became known to petitioner only after release of the CCH Report to service subscribers on March 5, 1975, after the date of filing for petitioner's brief on the merits on January 30, 1975. The Court in this case considered various alleged Williams Act violations, including violation of section 13(d). Following the weight of authority, the Court in the *Scott* case also held that injunctive relief required a finding of

irreparable harm, p. 97,422, and that where the section 13(d) violation "was merely a technical one," p. 97,420, no relief was warranted, p. 94,422.

II. RESPONDENT'S NEW ISSUE IS NOT PROPERLY BEFORE THE COURT

By Supreme Court Rule 24(4), petitioner is limited in this reply brief to discussion of new issues raised for the first time in respondent's brief on the merits. Respondent has raised a new issue by arguing that if the Circuit Court's opinion should be reversed, then the entire action should be remanded to the District Court for a full trial on the merits. This argument is improper because it is not fairly within the scope of the questions accepted for review when this Court issued its writ of certiorari. The well established principle is that an issue nowhere mentioned in the petition for certiorari is not before the Supreme Court for consideration, *Namet v. U.S.*, 373 U.S. 179 at 190 (1963). "We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition . . . ," *Irvine v. California*, 347 U.S. 128 at 129 (1954). When an issue is not raised in the petition, that issue is not properly before the Court, *Lawn v. U.S.*, 355 U.S. 339 at 363 (1958), reh. den. 355 U.S. 967 (1958); *National Licorice Co. v. NLRB*, 309 U.S. 350 at 357 (1940); *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376 at 386 (1960), reh. den. 362 U.S. 937 (1960). Respondent did not seek a writ of certiorari in this action, and the questions presented to and accepted by the Court neither state nor fairly comprise the issue of the validity of the District Court's resolution of the question of whether there were any genuine issue as to any material fact.

As stated in his brief on the merits, petitioner's questions were:

1. Did the Court of Appeals correctly decide that a showing of irreparable harm was not a prerequisite to granting injunctive relief under section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d)?

2. Did the Court of Appeals correctly decide that an unintentional, non-covert and non-conspiratorial violation of section 13(d) must be "neutralized" to deny the violator the benefit of his wrongdoing by the entry of a decree, after the violation has been corrected by filing a legally sufficient Schedule 13D, enjoining the violator from voting the shares he acquired in the period between the date he should have filed his 13D Schedule and the date it was actually filed?

By raising this new issue respondent is seeking to overturn both the District Court judgment and the judgment of the Court of Appeals without having filed a cross-petition for certiorari. This it may not do, *Alaska Ind. Bd. v. Chugach Assn.*, 356 U.S. 320 at 325 (1958). "What he may not do in the absence of a cross-appeal is to 'attack' the decree [below] with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . .,'" *Morley Co. v. Md. Casualty Co.*, 300 U.S. 185 at 191 (1937). "A respondent . . . may not attack [the judgment below] even on grounds asserted in the Court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him," *Le-Tulle v. Scofield*, 308 U.S. 415 at 421-2 (1940).

III. ALTERNATIVELY, RESPONDENT'S NEW ARGUMENT IS WITHOUT MERIT

Even if respondent's new issue were properly before the Court there is no basis for remanding this action for trial. The District Court's findings and conclusions were accepted by the Court of Appeals (App. 169, 175). Respondent now seeks a third review of the question of whether summary judgment was appropriate here, although it has not convinced even one of four judges at two independent hearings to accept its view of the facts. As noted by respondent at pages 3-4 of its brief opposing the petition for a writ of certiorari, there was fairly extensive discovery in this action. The relevant factual allegations were before the District Court, which was able to determine the nonexistence of any genuine issue as to any material fact from a record including extensive discovery. The Court of Appeals found no error as to the findings of no factual dispute..

Respondent argues at length that the standards necessary for summary judgment were not met and strongly urges the facts which it believes make the District Court decision improper. Petitioner does not dispute respondent's general statements of law, but as to the so-called counter-statement of facts, petitioner would only note that respondent has unsuccessfully urged those same arguments twice before. If the District Court is to be reversed, there must be critical flaws in its findings and conclusions. It is not a critical flaw for the District Court to make certain fact findings by way of explanation of its

conclusion that there were no genuine disputes as to the material and operative facts.*

Although findings of fact are unnecessary under Federal Rule of Civil Procedure 56 (Rule 52(a), last sentence), such findings are often appropriate because they may be helpful to the appellate court, *Gurley v. Wilson,* 239 F. 2d 957 (D.C. Cir. 1956); *Wolf v. Thomas,* 271 F. 2d 634 (6th Cir. 1959); *Prudential Ins. Co. of America v. Goldstein,* 43 F. Supp. 767 (E.D.N.Y. 1942). See also *Dolgow v. Anderson,* 438 F. 2d 825 at 829 (2nd Cir. 1971); *Rogers v. General Electric Co.,* 341 F. Supp. 971 at 972 *et. seq.* (W.D. Ark. 1972); *Millstein v. Leland Hayward Inc.,* 10 F.R.D. 198 (S.D.N.Y. 1950). Indeed, in the appropriate case summary judgment has been reversed on appeal because there were no findings of fact, *Winter Park Telephone Co. v. Southern Bell Telephone & Telegraph Co.,* 181 F. 2d (5th Cir. 1950). The propriety of summary judgment will depend on the circumstances of each particular case. ". . . [I]t cannot be stated too strongly that no type of action or issue is immune from a summary adjudication and that there will be instances when the rendition of a summary judgment is clearly called for, although the particular action or issue is one which does not lend itself to a summary adjudication as a general proposition," 6 *Moore's Federal Practice* ¶56.17[1].

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* The District Court's decision may properly be viewed as incorporating its statement of the facts respecting which there was no genuine issue, and as the basis for its conclusion that summary judgment was appropriate in view of the absence of a genuine issue of material fact. If this Court is at all inclined to consider respondent's so-called counter-statement of the case at pages 2-8 of its brief (which, we submit, would amount to a hearing *de novo* of petitioner's motion for summary judgment), the response to respondent's counter-statement will be found in petitioner's briefs filed in the Seventh Circuit Court of Appeals.

Respondent has already had the District Court's decision reviewed in the Court of Appeals which was bound to consider the facts in the light most favorable to respondent. Neither Court found any genuine issue as to any material fact.

IV. CONCLUSION

Petitioner respectfully requests that respondent's argument in favor of a new trial be refused consideration because it is not properly before the Court. Alternatively, petitioner respectfully requests that respondent's new argument be rejected as contrary to the well supported conclusions of the Court of Appeals and the District Court as to the nonexistence of any relevant factual disputes between the parties.

Respectfully submitted,

MAURICE J. MCSWEENEY
DAVID E. BECKWITH
LYMAN A. PRECOURT
RICHARD H. PORTER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400
Attorneys for Petitioner

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